LILY ROSSEL SEBASTIAN A

v.

PUSHPAM SUBRAMANIAM & ANOR

COURT OF APPEAL, PUTRAJAYA B
ABDUL KADIR SULAIMAN JCA
ARIFIN ZAKARIA JCA
NIK HASHIM JCA
[CIVIL APPEAL NO: A-02-792-02]
4 MAY 2007 C

CIVIL PROCEDURE: *Costs - Discretion of court - Withdrawal of motion and appeal proper by appellant - Whether respondents entitled to costs - Whether there were grounds for deprivation of costs*

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The appellant appealed against the decision of the High Court dismissing her appeal against the Disciplinary Board's decision under the Legal Profession Act 1976 ('LPA') holding that a formal investigation was not necessary and dismissing the appellant's complaints against both the respondents. Dissatisfied with the E
High Court's decision, the appellant filed the notice of appeal to the Court of Appeal and to avoid the appeal from being dismissed, the appellant filed a motion to have the case transferred to the Federal Court. Section 103E of the LPA clearly provides that any person aggrieved by the decision of the High Court shall have the F
right to appeal to the Supreme Court, now known as the Federal Court, within one month of the High Court's decision. As it now stands, appeals against the decision of the High Court under the section lie, not to the Court of Appeal, but directly to the Federal Court. The Court of Appeal also had no power to transfer this G
case to the Federal Court. The proper order should have been to strike out the appeal and leave it to the appellant to proceed with the necessary steps as provided by the Rules of the Federal Court 1995, in particular r. 126. On the date of the hearing, the appellant, for obvious reasons, applied to withdraw the motion H
and the appeal proper, and prayed for no order as to costs. Both the respondents did not object to the application for withdrawal but insisted on costs of RM2,000 and RM5,000 to be paid by the appellant to each of them for the motion and the appeal respectively; the appellant objected to the quantum. The issue I
requiring determination was whether upon the withdrawal of the motion and the appeal, the respondents were entitled to costs.

Held (for the respondents)
Per Nik Hashim JCA delivering the judgment of the court:

(1) The application to withdraw the motion and the appeal was granted by the court. Consequently, the court ordered the motion and the appeal to be struck out and in the exercise of its discretion (r. 96 of the Rules of the Court of Appeal 1994), costs were awarded to the respondents to be taxed. The works in opposing the motion and the appeal had been carried out by both the respondents. For that purpose, they had filed their respective affidavits-in-reply and written submissions. Since there had been no grounds which would induce the court to deprive them of their costs, the respondents were entitled to costs upon the withdrawal of the two matters. (paras 9 & 10)

Bahasa Malaysia *translation of headnotes*

Perayu merayu terhadap keputusan Mahkamah Tinggi kerana menolak rayuannya terhadap keputusan Lembaga Disiplin di bawah Akta Profesion Undang-Undang 1976 ('LPA') yang memutuskan bahawa suatu penyiasatan formal adalah tidak perlu diadakan sekaligus menolak aduan perayu terhadap kedua-dua responden. Tidak berpuashati dengan keputusan Mahkamah Tinggi, perayu memfail notis rayuan ke Mahkamah Rayuan dan bagi mengelakkan rayuan dari ditolak, memfail pula usul supaya kes dipindahkan ke Mahkamah Persekutuan. Seksyen 103E LPA menjelaskan bahawa mana-mana orang yang terkilan dengan keputusan Mahkamah Tinggi mempunyai hak untuk merayu ke Mahkamah Agong, kini Mahkamah Persekutuan, dalam tempoh sebulan dari tarikh keputusan Mahkamah Tinggi. Namun, pada kedudukan yang ada sekarang, rayuan-rayuan terhadap keputusan Mahkamah Tinggi di bawah seksyen bukan dihadap ke Mahkamah Rayuan tetapi dibawa terus ke Mahkamah Persekutuan. Mahkamah Rayuan juga tidak ada kuasa untuk memindahkan kes seperti ini ke Mahkamah Persekutuan. Maka perintah yang wajar adalah membatalkan rayuan dan membiarkan perayu sama ada untuk meneruskan dengan langkah-langkah perlu di bawah Kaedah-Kaedah Mahkamah Persekutuan 1995, khususnya k. 126. Di pendengaran, perayu, atas alasan yang dapat difahami, memohon untuk menarik balik usul dan rayuan sebenar, dan supaya tiada perintah kos dibuat. Kedua-dua responden tidak menentang permohonan untuk menarik balik, tetapi menuntut kos RM2,000 dan RM5,000 dibayar

kepada mereka masing-masing bersandarkan kepada usul dan rayuan di sini; perayu membantah terhadap kuantum yang diminta. Isu yang perlu diputuskan adalah sama responden-responden berhak kepada kos sebaik sahaja usul dan rayuan ditarik balik.

Diputuskan (untuk responden-responden)
Oleh Nik Hashim HMR menyampaikan penghakiman mahkamah:

(1) Permohonan untuk menarik balik usul dan rayuan telah dibenarkan oleh mahkamah. Oleh itu, mahkamah memerintahkan usul dan rayuan dibatalkan dan atas budibicaranya (k. 96 Kaedah-Kaedah Mahkamah Rayuan 1994) mengawardkan kos kepada responden-responden yang akan ditaksir. Kerja-kerja bagi menentang usul dan rayuan telah dijalankan oleh kedua-dua responden. Untuk maksud itu, mereka telah memfail afidavit jawapan mereka masing-masing serta hujahan-hujahan bertulis. Oleh kerana tiada alasan bagi mahkamah menidakkan kos kepada mereka, maka responden-responden adalah berhak kepada kos sebaik kedua-dua halperkara ditarik balik.

Case(s) referred to:
Gana Muthusamy v. Tetuan L M Ong & Co (Civil Application No: 08-19-1998 (J)) (Unreported) ***(refd)***
Gana Muthusamy v. Tetuan L M Ong & Co [1998] 4 CLJ 878 CA ***(refd)***
Lily Rossel Sebastian v. Pushpam Subramaniam & Anor [2003] 2 CLJ 658 HC ***(refd)***
United Malacca Berhad v. Pentadbir Tanah Daerah Alor Gajah [2002] 4 CLJ 177 FC ***(refd)***

Legislation referred to:
Legal Profession Act 1976, s. 103E
Rules of the Court of Appeal 1994, r. 96
Rules of the Federal Court 1995, r. 126

For the appellant - Rabin Devadason (WE Balasingam with him); M/s WE Balasingam
For the 1st respondent - Pushpam Subramaniam (in person); M/s Pushpam & Co
For the 2nd respondent - R Jegatheesa (in person); M/s RJ Esa & Co

[Appeal from High Court, Ipoh; Civil Appeal No: 17-01-2002]

Reported by Suresh Nathan

JUDGMENT

Nik Hashim JCA:

[1] The appellant appealed against the decision delivered by three learned judges: Abdull Hamid Embong J (as he then was), VT Singam J and Balia Yusof Wahi J on 14 September 2002 at the High Court Ipoh (see [2003] 2 CLJ 658) when the learned judges dismissed the appellant's appeal against the decision of the Disciplinary Board under the Legal Profession Act 1976 (the LPA) dated 19 December 2001 which held that a formal investigation was not necessary and that the appellant's complaints against both the respondents were dismissed.

[2] Dissatisfied with the decision of the High Court the appellant filed the notice of appeal to the Court of Appeal.

[3] To avoid the appeal from being dismissed, the appellant filed a motion (encl. 25(a)) to have the case transferred to the Federal Court. The motion was supported by an affidavit affirmed by an advocate and solicitor, Williams Ernest Balasingam, who asserted that "I instructed Messrs. N. Saraswathy Devi, a firm of solicitors in Kuala Lumpur, to file the notice of appeal at the Federal Court. It was rejected by the clerk at the counter who said that the Federal Court only hears appeals from the Court of Appeal and that it should be filed at the Registry in the Ipoh High Court. Upon the instructions of the clerk at the Federal Court Registry, I filed the notice of appeal to the Court of Appeal at the Registry of the High Court in Ipoh." Apart from this affidavit, there was nothing to substantiate the assertion.

[4] Affidavits in reply in encls. 27 and 28 were filed by the 2nd and 1st respondents respectively. The appellant and the respondents also filed their respective written submissions.

[5] It is to be noted that s. 103E of the LPA clearly provides that any person aggrieved by the decision of the High Court shall have the right to appeal to the Supreme Court, now known as the Federal Court, within one month of the decision of the High Court. As it now stands, appeals against the decision of the High Court under the section lie, not to the Court of Appeal, but directly to the Federal Court. In *Gana Muthusamy v. Tetuan L M Ong & Co.*, Mahkamah Persekutuan Permohonan Sivil No. 08-19 Tahun 1998 (J) dated 3 November 1998 (unreported) the Federal

Court (Mohd Eusoff Chin CJ, Wan Adnan Ismail CJ (Malaya) and Dr. Zakaria Yatim FCJ) set aside the decision of the Court of Appeal in *Gana Muthusamy v. Tetuan L M Ong & Co.* [1998] 4 CLJ 878 for lack of jurisdiction to entertain the appeal brought before it.

[6] It must also to be noted that the Court of Appeal has no power to transfer this case to the Federal Court. In *United Malacca Berhad v. Pentadbir Tanah Daerah Alor Gajah* [2002] 4 CLJ 177 the Federal Court ruled that the Court of Appeal has no power to transfer cases to a higher court ie, the Federal Court. The proper order should have been to strike out the appeal and leave it to the appellant to proceed with the necessary steps as provided by the Rules of the Federal Court 1995, in particular r. 126.

[7] On the date of hearing ie, 21 March 2005, learned counsel for the appellant, for obvious reasons, applied to withdraw the motion and the appeal proper and prayed for no order as to costs. Both the respondents did not object to the application for withdrawal but insisted on costs of RM2,000 and RM5,000 to be paid by the appellant to each of them for the motion and the appeal respectively. Learned counsel for the appellant objected to the quantum.

[8] The issue before us was simple: whether upon the withdrawal of the motion and the appeal, the respondents were entitled to costs.

[9] The application to withdraw the motion and the appeal was granted by the court. Consequently, the court ordered the motion and the appeal to be struck out and in the exercise of our discretion (r. 96 Rules of the Court of Appeal 1994), we awarded costs to the respondents to be taxed. The deposit was ordered to be shared equally to account of their taxed costs.

[10] The works in opposing the motion and the appeal had been carried out by both the respondents. For that purpose they had filed their respective affidavits in reply and written submissions. Since there had been no grounds which would induce the court to deprive them of their costs, the court was of the view that the respondents were entitled to costs upon the withdrawal of the two matters.

A **[11]** My learned brother Arifin bin Zakaria, FCJ has seen this judgment in draft and has expressed his agreement with it. My learned brother Abdul Kadir bin Sulaiman, FCJ has since retired and has no opportunity to see the judgment in draft.

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